Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioners,*

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF OF CHARGING PARTIES INTERNATIONAL ASSOCIATION OF NVOCCs AND TWIN EXPRESS, INC. IN OPPOSITION TO THE PETITION

RAYMOND P. DEMEMBER
Suite 400
3251 Old Lee Highway
Fairfax, Virginia 22030
(703) 691-0900

Attorney for International Association of NVOCCs and Twin Express, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF ISSUES	1
INTEREST OF THE ASSOCIATION AND TWIN EXPRESS	2
ARGUMENT	2
CONCLUSION	7

TABLE OF CASES

Court CASES:	PAGE
Danielson v. *Joint Board of Coat, Suit & Allied Garment Workers*, 494 F2d 1230 (2d Cir. 1974)	3, 6
Hirsch v. *Building & Construction Trades Council*, 530 F2d 298, 302 (3d Cir. 1976)	3, 4
Humphrey v. *International Longshoremen's Association*, 548 F2d 494, (4th Cir. 1977)	3, 4, 6
Kaynard v. *Palby Lingerie, Inc.*, 625 F2d 1047, (2d Cir. 1980)	3, 4
Samoff v. *Building & Construction Trades Council*, 475 F2d 203 (3d Cir.)	3, 4
Solien v. *United Steelworkers of America*, AFL-CIO-CLC, 593 F. 2d 82, (8th Cir., 1979), cert. den., 100 S. Ct. 54	3
Squillacote v. *Graphic Arts Int'l. Union*, Local 277, 540 F2d 853 (C.A. 7, 1976)	3
Union de Tronquistas de Puerto Rico v. *Arlook*, 586 F. 2d 872, (1st Cir. 1978)	3
Wilson v. *Milk Drivers & Dairy Employees Union, Local 741*, 491 F 2d 200, 203 (8th Cir. 1974)	5
Youngstown Sheet and Tube Co. v. *Sawyer*, 343 U.S. 579, 609-10 (1952)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2095

NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioners*,

v.

WILLIAM A. PASCARELL, Acting Regional Director of the Twenty-Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF OF CHARGING PARTIES INTERNATIONAL ASSOCIATION OF NVOCCs AND TWIN EXPRESS, INC. IN OPPOSITION TO THE PETITION

COUNTERSTATEMENT OF ISSUES

1) Whether the Court below correctly affirmed the district court's grant of injunctive relief under Section 10(1) of the National Labor Relations Act (Act) when the district court found that the Regional Director of National Labor Relations Board (Board) had "reasonable cause" to believe a violation of the Act ex-

isted, and further found that the legal theory advanced by the Regional Director was "substantial and not frivolous"?

2) Whether the Court below correctly affirmed the district court's issuance of injunctive relief as "just and proper" under section 10(1) because it comports with the Congressional judgment that hot cargo agreements so disrupt commerce that they must be halted pending the Board's adjudication of the merits?

INTEREST OF THE INTERNATIONAL ASSOCIATION OF NVOCCs AND TWIN EXPRESS, INC.

The International Association of Non-Vessel Operating Common Carriers (NVOCCs) and Twin Express, Inc. (Twin) are charging parties in the unfair labor practices proceedings before the Board and participated in the injunction proceedings before the district court and as amici curiae in the court of appeals. The unfair labor practices cited in the complaint are so-called secondary boycotts and hot cargo agreements (violation of Sections 8(b)4 and 8(e) of the Act) causing the cessation of operations of certain NVOCCs. As charging parties who seek relief from the unfair labor practices, the Association and Twin have a vital interest in the outcome of this case, since the very existence of NVOCCs operations is at stake.

ARGUMENT

Summary Of The Relevant Statutory Standards

Section 10(1) Statutory Standards

Under Section 10(1) of the Act, the limited question presented to the district court is whether the Regional Director has reasonable cause to believe that the

elements of an unfair labor practice are present and that the legal theory presented is substantial and not frivolous. *See, e.g., Hirsch* v. *Buildings & Construction Trades Council*, 530 F.2d 298 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council*, 475 F2d 203 (3d Cir.), *vacated as moot*, 414 U.S. 808 (1973).

Thus, if the Board's theory cannot be characterized as insubstantial and frivolous, "the district court must grant the injunction since this will best effectuate the Congressional policy against disruption of commerce expressed in Section 10(1)." *Id.* at 207 Under this standard, "the Regional Director faces a relatively insubstantial burden of proof when he petitions a district court for temporary injunctive relief pursuant to Section 10(1)." *Id.* See also *Squillacote* v. *Graphic Arts Int'l. Union*, Local 277, 540 F. 2d 853 (C.A. 7, 1976); *Union de Tronquistas de Puerto Rico* v. *Arlook*, 586 F. 2d 872, (1st Cir. 1978); *Solien* v. *United Steelworkers of America*, AFL-CIO-CLC, 593 F. 2d 82, (8th Cir., 1979), cert. den., 100 S. Ct. 54.

The district court did not find that the legal theory of the Board Regional Director was erroneous (Pet. Br. pp. i, 8) but rather that it was reasonable and not frivolous (191a).

Petitioners' citation of *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers*, 494 F.2d 1230, (2d Cir. 1974); *Humphrey* v. *International Longshoremen's Association*, 548 F2d 494, (4th Cir. 1977); *Kaynard* v. *Palby Lingerie, Inc.*, 625 F2d 1047, (2d Cir. 1980) (analogous NLRA Section 10(j) proceeding) (Pet. Br. p. 9) is not relevant. Further, in *Danielson* and *Humphrey* the courts emphasized that the district courts should accord considerable deference to the Regional Director's construction of the statute. And

in *Humphrey* where the unfair labor practice involved the same container rules in issue here the Fourth Circuit *reversed* the district court's denial of a 10(1) injunction.

And in *Kaynard* the Second Circuit *affirmed* the district court's grant of a 10(j) injunction based on a reasonable cause finding.

Petitioners also misstate the issue with respect to the Third Circuit's implied directive to its district courts to ignore consideration of whether issuance of 10(1) injunction is just and proper (Pet. Br. pp. i, 11-13).

However, a refusal to apply traditional equitable principles is not tantamount to a refusal to consider whether the issuance of an injunction would be "just and proper." Yet Petitioners' argument that the district court should have balanced the equities reveals their misunderstanding of the limited role of the district court in a section 10(1) proceeding. Indeed, had the district court pursued the course advocated by Petitioners and denied the injunction, the district court would have abused its discretion.

The underlying purpose of section 10(1) cannot be understood without reference to the statutory scheme of the National Labor Relations Act. Section 10(1) reflects the judgment of Congress that certain unfair labor practices, including secondary boycotts and hot cargo agreements, are so disruptive of commerce that they must be halted pending the Board's adjudication on the merits to avoid *irreparable injury to the policies of the Act. See Hirsch* v. *Building & Construction Trades Council*, 530 F2d 298, 302 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council*, 530 F.2d 298, 302 (3d Cir.), *vacated as moot*, 414 U.S. 808 (1973) (emphasis added). Because Section 10(1) was included in the

statute to protect the public's interest in the free flow of commerce and *not* for the protection of vindicating private rights, Congress, in enacting the statute, has balanced the equities.

Thus, the district court below correctly determined that it was precluded from applying traditional equitable principles under the section 10(1) statutory scheme. (188a-189a). The application of traditional equitable principles here would only serve to frustrate the congressional scheme.

Thus, a court faced with a petition for injunctive relief under Section 10(1) must exercise its discretion in light of the general objectives of that statute. Cf. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-10 (1952) ("when Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of equitable discretion"). Therefore, injunctive relief is just and proper when there is reasonable apprehension that the statute's remedial purposes will be frustrated in the absence of such relief. *See Wilson* v. *Milk Drivers & Dairy Employees Union. Local 741*, 491 F 2d 200, 203 (8th Cir. 1974).

Petitioners also argue that the district court lacked jurisdiction to entertain a 10(1) application here. This argument is frivolous and was flatly rejected by the district court (191a-192a) and the Circuit Court below (6a-7a).

Petitioners state that the petition should be granted because of a conflict in the circuits (Pet. Br. p. 8), referring to a "four way split in the circuits" (Pet. Br. p. 9

There is in fact no such conflict or split. Petitioners themselves concede that the First, Third, Fifth, Seventh, Eighth and Ninth Circuits are essentially in accord (Pet. Br. p. 9). The Sixth and Tenth Circuits are not in conflict since according to Petitioners (Pet. Br. p. 9, 10) they have not elaborated on the literal language of the statute The District of Columbia Circuit has never decided a 10(1) case. This leaves the Second and Fourth Circuits with the *Danielson* and *Humphrey* cases respectively cited in support of the "conflict." In *Humphrey*, as stated above, the Fourth Circuit reversed the district court's denial of an injunction with respect to the same container rules in issue here. As for *Danielson*, the decision should be read in the context of the case, in which the Court characterized the theory of law advanced as being a "new adventure . . . in the interpretation of a statute fourteen years after it had come on the books." (494 F2d at 1245) and as an "effort to stretch" the prohibitions of the Act so far that even if the Board found a violation "the order would not be enforced unless some new facts or legal theories should appear" (494 F 2d at 1239).

Thus, the alleged "conflict" is really non-existent.

CONCLUSION

The Court below correctly affirmed the district court's grant of the injunction and therefore, for all of the above reasons, the petition for a writ of certiorari should be denied.

Dated: July 9, 1981

Respectfully submitted,

RAYMOND P. DEMEMBER
Suite 400
3251 Old Lee Highway
Fairfax, Virginia 22030
(703) 691-0900

Attorney for
International Association of NVOCCs and Twin Express, Inc.